Supreme Court of the United States.

October Term, 1898.

No. 288.

JOHN F. MALONY,

Appellant.

vs.

O. H. ADSIT,

Appellee.

STATEMENT OF THE CASE.

In May, 1896, Adsit filed his complaint against Malony, in the District Court of the United States for the District of Alaska, in which he asked the recovery of the possession of an undivided one-half part or interest in and to the premises, on the corner of Second and Franklin streets, in the town of Juneau, Alaska, better described as Lot 4 in Block 4, according to the plat and survey of the town of Juneau made by J. C. Hanus, adopted in the year 1881, by the citizens of the town, which was formerly known as Rockwell but is now known as Juneau. Rec., p. 1.

Malony demurred to the complaint, and the demurrer was overruled. Rec. p. 3. In his answer (Rec. pp. 4, 5) he denied specifically the averments

of the complaint, and plead, affirmatively, in substance as follows: That on or about the 24th day of November, 1891, Alfred H. Gamel was in the quiet and peaceable possession of an undivided one-half interest in the lot described in the complaint: that on January 20, 1894, the said Gamel conveyed and transferred to Malony all his right, title and interest in and to the lot and buildings; that thereupon Gamel delivered the possession of the lot and premises to Malony; that the latter ever since that time, by himself and his tenants, has been in the quiet and peaceable possession of the lot, and now is in the quiet and peaceable possession of the same; that Malony and his grantors have been in the quiet and peaceable occupancy of said lot and premises for more than three years; that his estate and interest therein had not expired or ended; and that by reason thereof the plaintiff ought not now be allowed to maintain his action.

Adsit replied to Malony's answer specifically denying all the allegations therein contained, and asking judgment as prayed for in his complaint. Rec. pp. 5, 6.

The case was tried August 20, 1897, and the court made certain findings of fact and conclusions of law. The facts we will summarize as follows:

1. April 19, 1881, Adsit and his grantors entered into actual possession of the property described in the complaint, claiming it in their own right, and they have occupied, used and possessed the property ever since that date, and have erected a building thereon, using and claiming it in their own right

from that date to the time of trial, adversely to all the world and especially as against Malony.

2. That Adsit is the owner of an undivided half interest in Lot No. 4.

3. That Malony, April 29, 1891, without right or title, entered upon the lot and ousted and ejected Adsit and his grantors therefrom, and from that time hitherto has wrongfully withheld the possession thereof from the said plaintiff.

The conclusions of law are substantially as follows:

1. That Adsit is the owner and entitled to the possession of the undivided one-half part of the lot and that Malony has no right, title or interest in or to the undivided one-half part thereof.

2. That Adsit is entitled to a judgment for the recovery of the possession of the undivided one-half part of Lot 4 as against Malony and all persons claiming under him.

3. That Adsit is entitled to a judgment for costs. Rec., pp. 7, 8.

Judgment was rendered, according to the findings of the court, August 10, 1897. Rec., pp. 8, 9. On the same day, Malony filed his motion for a new trial, alleging insufficiency of evidence and errors of law occurring at the trial. Rec. pp. 9, 10.

This motion was overruled August 20, 1897. Rec., p. 11.

Malony appealed and filed his assignment of errors August 31, 1897. Rec., pp. 11 to 15 inclusive. This document assigns the errors complained of with particularity and exactness.

A writ of possession was issued and the Marshal

served it by placing Adsit in possession of the property, September 20, 1897. Rec., pp. 16, 17.

Then follow the usual notice of appeal, petition and affidavit, the latter showing the property in dispute to be of a value exceeding $5,000. Rec., pp. . 18, 19.

The bill of exceptions, setting forth the evidence and the rulings of the court, is to be found in the Record, pp. 19 to 56, inclusive. Then follows the usual appeal bond, citation, order to certify the Record, and the certificate of the clerk. Rec., pp. 56, 57, 58.

For the information of the court, we have made abstracts of the titles claimed by the respective parties. They are as follows:

Adsit's Claim of Title.

1. April 22, 1881, W. E. Hunt, location notice Lot 4, Block 4, Rec., p. 29.

2. May 6, 1881, Joseph Twan to Northwestern Trading Company, deed (trust), Lot 4, Block 4. Rec., p. 21.

3. Sept. 12, 1881, J. M. Cooper, attorney in fact for W. E. Hunt to Joseph Twan (no power of attorney or other evidence of authority) deed, Lot 4, Block 4, Rec., p. 29.

4. March 22, 1888, Joseph Twan to Wm. Van Gasken, deed, undivided one-half of Lot 4, Block 4. Rec., p. 22.

5. July 13, 1888, William Van Gasken to Alaska Mercantile and Packing Company, deed, undivided one-half of Lot 4, Block 4. Rec., p. 23.

6. July 21, 1891, certified copy of Articles of In-

corporation of Alaska Mercantile and Packing Company, filed for record in Juneau Recording District. The articles are dated *March* 12, 1888, appear to have been filed in the office of the secretary of Washington Territory, *March* 15, 1888, and the copy filed in Juneau was certified by the secretary of State of Washington, *June* 23, 1891. Rec., pp. 26 to 28, inclusive.

7. October 21, 1891, Alaska Mercantile and Packing Company to William J. Thompson, deed (without corporate seal), undivided one-half Lot 4, Block 4. Rec., p. 24.

8. March 24, 1894, William J. Thompson and wife to O. H. Adsit, deed undivided one-half Lot 4, Block 4. Rec., p. 25.

Mem.—

This purports to be the record of a deed filed for record April 4, 1894, and recorded in Book 10 of Deeds, p. 13, the deed having been executed before "J. M. Brown, county clerk and clerk of the Superior Court," the venue being, "State of Washington, County of Pierce." See pp. 20 and 26 of Transcript.

The original deed was also offered in evidence by plaintiff, and it appears from it that the venue of the acknowledgment is "United States, District of Alaska," and that the acknowledgment was made by "J. M. Brown, county clerk and clerk of Superior Court."

There are no counties, county clerks, or Superior courts in Alaska.

Malony's Title.

1. November 24, 1891, marshal's deed to Alfred H. Gamel, by virtue of writ of execution out of United States District Court, on judgment recovered July 25, 1891, in favor of Aaron Shellhouse against Wm. VanGasken and —— Birmingham, formerly partners under the firm name of Alaska Mercantile and Packing Company, deed for undivided one-half Lot 4, Block 4. Rec., pp. 38 to 40, inclusive.

2. January 20, 1894, A. H. Gamel to Emery Valentine, deed undivided one-half Lot 4, Block 4. Rec., pp. 40 to 41.

Mem.—

This deed was made by J. F. Malony as attorney in fact, power of attorney of record. Rec., pp. 43 and 44.

3. January 20, 1894, Emery Valentine to J. F. Malony, deed undivided one-half Lot 4, Block 4. Rec., p. 42.

Argument.

I.

By the treaty of March 30, 1867 (15 Stat., 539), Russia ceded Alaska to the United States. By the terms of the treaty the fee simple title to certain real estate conferred under Russian rule upon certain individuals and the Greek Oriental Church, was confirmed. (Sec. 23, L. D. 417.) No provision was made for the disposition of the other lands in Alaska, by the treaty or otherwise, until the act of May 17, 1884 (23 Stat., 84) which provided a government for the District of Alaska, and extended the United States *mineral land laws* over the District.

It was provided therein that the *status quo* as to the use and occupancy of lands for other than mining purposes should be preserved until Congress should act, and that nothing in the act should be construed to put in force in the District the general land laws of the United States (see 23 L. D., 419). The title to the lands remained in the United States (*Kinkead vs. United States*, 150 U. S., 483). Sec. 2387 R. S. (the townsite section) was not operative in Alaska until the enactment of the law of March 3, 1891 (26 Stat., 1099). The town of Juneau was entered under the authority of the latter act, October 13, 1893 (see 23 L. D., 417), and patent thereon was issued September 4, 1897.

Section 7, of the act of May 17, 1884, *supra*, made the general laws of Oregon applicable to Alaska. The section is still in force.

II.

We will consider the assignments of errors in their order, and as they are set forth at length in the Record, we will content ourselves with summarizing them.

First.

In this assignment, Rec., p. 11, it is alleged that the court erred in overruling defendant's demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action.

1. The complaint, Rec., p. 1, avers that the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession for more than nine years. This is not an averment of

a "legal estate in real property, and a present right to the possession thereof," as required by the laws of Oregon.

Sec. 316 (313) of Hill's Oregon Code provides: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action of law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof."

A suit brought under this section is an action of ejectment. *Goldsmith vs. Smith*, 10 Saw., 294, an Oregon case.

It is an elementary rule that the plaintiff must have a present right of possession.

Cincinnati vs. White, 6 Peters, 431 (441);
Heffner vs. Betts, 32 Pa. St., 376;
Payne vs. Treadwell, 5 Cal. 310;
At commencement of suit, *Kile vs. Tubbs*, 36 Ind., 332;
And at time of trial; Cresap vs. Huston, 9 Gill, 269;
Alden vs. Grove, 18 Pa. St., 377.

The averment is that the defendant is in possession.

Title is presumed from possession. *Stark vs. Starr*, 1 Saw. 15, an Oregon case. The presumption of title in the defendant arising from his possession of the realty must be overcome by proof of title in the plaintiff, which is good at least as against the defendant.

People vs. Leonard, 11 Johns., 504;
Eldon vs. Doe, 6 Blackf., 341;
Stanford vs. Maugin, 30 Ga. 355.

These are all fundamental rules in the law of ejectment, and are applicable to this case. The pleader seems to have had them in mind to some extent, but he failed to plead "the nature of his estate in the property, whether it be in fee, for life, or for a term of years," as required by sec.318 (315) of Hill's Oregon Code, which is as follows:

"The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage such sum as may be therein claimed." * * *

A complaint in ejectment to be sufficient, must comply with that section.

Thompson vs. Wolf, 6 Or. 308;
Johnson vs. Crookshanks, 28 Pac. Rep. 78.

2. The complaint is insufficient, we think, because it avers that the defendant has ousted the plaintiff of an "undivided half interest," one "James Winn" being "the owner of the other undivided one-half part or interest." So there are two persons occupying this lot, each holding an *undivided* half, but Malony was chosen as the one who had ousted the plaintiff from an undivided half.

According to the complaint, Malony and Winn had been actually in the occupancy of the lot since April 29, 1891. In such case if Adsit felt himself the rightful co-tenant of Winn, he should have brought his suit in equity for the purpose of determining such adverse claim. In accord with our views are *Goldsmith vs. Smith*, 10 Saw 294, and *Goldsmith vs. Gilliland*, 10 Saw, 666, both Oregon cases.

3. Having failed to comply with the statutory provisions which we have copied, it will be considered by the law that he endeavored to bring the action as in forcible entry and detainer. *Thompson vs. Wolf*, 6 Or., 308. But here he encountered certain statutory provisions. By Sec. 3510, Hill's Oregon Code, it is enacted that—

> "When a forcible entry shall be made upon any premises, or when an entry shall be made in a peaceable manner, and the possession shall be held by force, the person entitled to the premises may maintain an action to recover the possession thereof before any justice of the peace of the county in which such real property is situated."

And section 3511 is as follows:

> "In such action it shall be sufficient to state in the complaint the description of the premises with convenient certainty that the defendant is in possession thereof, that he entered upon the same with force, or unlawfully withholds the same with force, as the case may be, and that the plaintiff is entitled to possession thereof."

This complaint neither alleges the forcible entry nor the forcible detention of the property.

The legislature of Oregon saw fit to declare what should be an unlawful holding by force. Secs. 3519 and 3520 of Hill's Oregon Code are as follows:

> "Sec. 3519. The following shall be deemed cases of unlawful holding by force within the meaning of this chapter:
>
> 1. When the tenant or person in possession of any premises shall fail or refuse to pay any rent due on the lease or agreement under which he holds, or deliver up the possession of said premises for ten days after demand made in writing for such possession.
>
> 2. When, after a notice to quit as provided in this chapter, any person shall continue in the possession of any premises at the expiration of the time limited in the lease or agreement under which such person holds, or contrary to any condition or covenant thereof, or without any written lease or agreement therefor."
>
> "Sec. 3520. A notice to quit must be in writing and must be served upon the tenant or person in possession by being delivered to him or left at the premises in case of his absence therefrom."

Neither the allegations nor the proof in this case, as we will show later on, bring it within the purview of these statutes.

4. But if this complaint should be held sufficient otherwise, it must fall for the reason that the action was not commenced within three years from the time the defendant's possession began. The complaint alleges that the defendant, and his grantors, on or about the 29th day of April, 1891, entered

upon the premises and ousted the plaintiff and his grantors therefrom, "and from thence hitherto has wrongfully withheld and still wrongfully withholds the possession thereof from him, the said plaintiff." This complaint was filed in the court below May 25, 1896, more than five years from the day of the entry and ouster complained of. Therefore, this case clearly comes within Sec. 3524, Hill's Oregon Code, which is as follows:

> "In an action to recover the possession of any land, tenement, or other real property, where the entry is forcible, or when the possession is unlawfully held by force, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party is ended."

It will be noticed that this statute covers all actions brought to recover the possession of real property. In this connection we ask the attention of the court again to the fact that the defendant pleaded in bar of the action the three years' quiet possession of the premises immediately preceding its commencement.

For these reasons we submit that the first assignment of error is well taken.

Second.

In this assignment, Rec., p. 11, it is claimed that the court erred in allowing the plaintiff to introduce any evidence under the complaint because the com-

plaint was insufficient in law in this: That it does not appear therefrom that the plaintiff has a legal estate in real property, nor is the nature of such estate averred, whether it be in fee for life or for a term of years, as provided by the laws of Oregon; that it is alleged that the defendant ousted the plaintiff and his grantors from the possession of an undivided one-half interest in the property; that he wrongfully withholds that interest from the plaintiff, an impossible state of affairs and insufficient to maintain ejectment: and that the complaint considered as one in forcible entry and detainer is fatally defective in not alleging a demand in writing at least ten days before the commencement of the action.

For objections, see Rec., pp. 20, 29, 30.

All that we have said in favor of the first assignment of error is applicable here. If the complaint was insufficient in law, the court erred in admitting evidence in its support. Sec. 3519 of Hill's Oregon Code, elsewhere quoted in this brief, provides for ten days, notice in writing. There is no such notice in this Record.

Two-and-a-half.

This assignment, Rec., p. 12, is that the court erred in permitting the plaintiff to introduce in evidence the record of a paper purporting to be a notice of location of Lot 4 by W. E. Hunt, April 19, 1891. The objections to this evidence were that it is incompetent, immaterial and irrelevant, no foundation for the introduction of the evidence had been laid, because the absence of the original was not accounted for, that there was no provision of law at

that time providing for the making, filing and recording of such notice, or the making of such notice any evidence of any rights in the premises, and there is no provision of the law making admissible in evidence such purported record, it not purporting to be an instrument certified, proved, or acknowledged in any manner. For objections, see Rec., pp. 20, 29, 30.

The Record, pages 28, 29, shows that the court permitted the claimant to introduce in evidence the alleged record of a location notice as follows:

> "I claim Lot 4, in Block 4, in the town of Rockwell, as a homestead. April 22, 1881.
>
> W. E. HUNT."

This paper seems to have been recorded in Book "B" of Records. Defendant objected to the introduction of the Record and notice upon the ground of incompetency, immaterialty and irrelevancy, and that the proper foundation had not been laid. Rec., pp. 20, 30. These objections the court overruled and admitted the Record in evidence. The objections to this alleged record of notice are so clearly and fully stated in the assignment of error that we do not deem it necessary to repeat them here. This court will take cognizance of the fact that the town site laws of the United States were not in force in the district of Alaska until the pasage of the act of March 3, 1891 (26 Stat. 1099). Therefore it follows that such alleged location notice could serve no purpose, nor convey any rights, nor was it an instrument which could be recorded under the law. Neither the instrument, nor the purported record of it, was admissible in evidence, as we think.

It was held by this court in *Carter vs. Ruddy*, 166 U. S., 493, that an action in ejectment can not be maintained on an equitable title. There is nothing in the case before the court to exempt it from the rule that a patent is necessary in order to convey legal title. Here there was neither an entry nor a patent.

Third.

This assignment, Rec., p. 12, is based on the introduction of a book of deeds of the Juneau recording district, purporting to be the record of a conveyance from Cooper to Twan of the lot in dispute, and over the following objections: That it was not shown that Cooper ever occupied or was in possession of the lot, or had any claim thereto; that Cooper purports to be the attorney in fact of Hunt, but said conveyance was not executed by Hunt through his attorney in fact; that there was no proof that Cooper was the attorney in fact of Hunt; that the purported conveyance does not appear to have been acknowledged or so proved as to entitle it to record; that there was no evidence that it was ever executed by Cooper as attorney in fact or otherwise, and that no foundation was laid for its introduction, even if competent, relevant or material.

For objections, see Rec. pp. 20, 29, 30.

1. The foundation of the plaintiff's alleged title appears to have been a location notice by W. E. Hunt, dated April 22, 1891, claiming as a homestead Lot 4, in Block 4, in the town of Rockwell, now Juneau, although the homestead laws were not in force in Alaska until the act of May 14, 1898, acts 2d Sess,, 55th Cong., 409. By the alleged deed,

dated September 12, 1881, J. M. Cooper, styling himself "attorney in fact for W. E. Hunt," pretended to transfer the land to Joseph Twan. Rec., p. 29.

This is quite a remarkable instrument, and we will copy it here:

> "Know all men by these presents, that I, J. M. Cooper, attorney in fact for W. E. Hunt, for and in consideration of the sum of twenty dollars, lawful money of the United States, in hand paid by Joseph Twan, the receipt of which is hereby acknowledged, has bargained, sold, and forever quit-claimed unto the said Joseph Twan, and by these presents do forever quit-claim all my right, title, and interest in one town lot in the town of Rockwell, Alaska, known as Lot 4, in Block 4, with all and singular the hereditaments and appurtenances belonging thereto.
>
> Witness my hand and seal the 12th day of September, 1881.
>
> J. M. COOPER,
> Attorney in fact for W. E. Hunt.
>
> Witnesses:
> R. DIXON,
> I. BOOKER."

It will be noticed that it purports to be and is the conveyance of "J. M. Cooper, attorney in fact for W. E. Hunt," who, after acknowledging the receipt of a certain consideration, proceeds to assert that he "has bargained, sold, and forever quit claimed unto the said Joseph Twan, and by these presents do forever quit-claim all my right, title, and interest in one town lot," describing it "with all and singular the hereditaments and appurtenances belonging

thereto." Cooper describes himself as attorney in fact for W. E. Hunt. *The language used is merely a description of the person.* The deed does not purport to be the deed of W. E. Hunt. It does not purport to quit-claim or convey any title or interest in the property that he may have, but it does undertake to convey all of the title and interest therein that J. M. Cooper may have. If an attorney in fact has power to convey lands he must do it in the name of his principal. The principal must grant the land or it is not granted at all.

2. Again, there is nothing in this record to show, either antecedent or subsequent to the introduction of this paper in evidence, that J. M Cooper was the attorney in fact for W. E. Hunt. He could not occupy that relation with reference to the conveyance of an interest in real estate without being possessed of a written authority signed, acknowledged, and hedged about with all of the solemnities which the law prescribes for a deed conveying an interest in real estate. In order to enable an agent to execute a deed for his principal, he must have a power of attorney duly executed under seal. 5 Am. & Eng. Ency. of Law, 439.

In the absence of proof showing that he was actually the attorney in fact for Hunt, and had the power to convey the real estate, this alleged deed was inadmissible in evidence.

3. In this connection, the case of *Fowler vs. Shearer*, 7 Mass. 14, is both interesting and instructive. There the deed began:

> "Know ye that I, Abigail Fowler, of Palmer, gentlewoman, and also as the attorney of John

> Fowler, in consideration," etc., "paid by Daniel Shearer, of Palmer," etc., "have given and granted, and by these presents do give and grant," etc.

The language of the remainder of the deed purports to be her conveyance and her covenants. She covenants therein that she is the sole owner, has in herself good right to sell, and that she and her heirs will warrant the title. Then the instrument concludes:

> "In witness whereof I have hereunto set my hand and seal this seventh day of August, A. D. 1805."

It will be observed that there is a striking similarity between this deed and the one executed by J. M. Cooper, attorney in fact. In passing on the Fowler deed, the court said:

> "But if she had authority to pass the land described in the deed, the authority should have been pursued, and the deed must have been the deed of her husband. It ought to have been in his name, and as his proper act. His name and seal should have been put to it, in order to pass his estate, as well as her own name and seal to pass her estate. But she in fact, after naming herself the attorney of her husband, assumes to convey the estate in her own name; all the covenants are her own; and she executes the deed only for herself and in her own name. * * * But we are satisfied that it is not the deed of the husband. If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must

be the act of the principal and not of the attorney, otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance to declare that he does it as attorney; for he, being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name."

In this Massachusetts case, the deed was accompanied by a power of attorney, but no power of attorney was shown in behalf of Cooper in the case before the court.

4. Again, this pretended deed was not acknowledged, and therefore could not be admitted to record, nor could the record be admitted in evidence.

Fourth.

In this assignment, Record p. 12, it is averred that the court erred in admitting in evidence what purported to be the record of a mortgage, or deed of trust, from Joseph Twan to the North West Trading Company, over these objections: That it appeared to be cancelled on the Record; that it was entirely immaterial and irrelevant to the issues of the case, as it did not show, or pretend to show, that Twan ever occupied or was in possession of the premises in dispute; that the pretended record thereof is not a record in this, that the purported instrument does not appear to have been acknowledged, or certified, or so proved, as to entitle it to record under the laws of Oregon then in force in the district of Alaska, and that there was no proof that Twan ever executed the mortgage or deed of trust.

The Record shows, pp. 19 to 22, that there was

introduced in evidence what purported to be the record of a deed of trust, from Joseph Twan to the North West Trading Company, to secure to the grantee payment of $232.41, four months from the date of the deed, May 6, 1882. For the record of the offer of this evidence see the bottom of page 19, and for the objections see Rec., p. 20, transcript 40. The objections were that it was incompetent, immaterial, and irrelevant; that it appears upon the pages of the record that the instrument has been cancelled; that it does not appear that the instrument was ever acknowledged or certified to, entitling it to record under the laws of Oregon, and that the proper foundation for its introduction has not been laid.

It is true that this instrument does not appear to have been acknowledged. It is also true, according to the Record, p. 22, near the top thereof, that there appears across the face of the Record these words: "Cancelled at the request of Carl Sphuhu, N. W. T. Co., and Joseph Twam. Oct. 6, 1884."

As the instrument does not appear to have been acknowledged, it was not admissible of record, and therefore, the record was not admissible in evidence. As the instrument was nothing but a deed of trust at any time, and as it had been cancelled long before Adsit claimed title to an interest in the premises, it had fully performed all of its functions, and had no relation to this controversy. That all concerned understood that this instrument was *functus officio* is clearly established by the fact that March 22, 1888, Joseph Twan executed a deed for the property to William Van Gasken, Rec., p. 22.

Fifth.

In this assignment, Rec., p. 13, it is stated that the court erred in admitting in evidence what purports to be the record of a deed from Joseph Twan to William Van Gasken of an undivided one-half interest in Lot 4, over these objections: That it was immaterial and irrelevant; that no proper foundation had been laid for its introduction; and that it did not appear by the evidence that Twan had any interest or title which he could convey.

This deed is to be found on page 22 of the Record, and purports to quit-claim to the grantee what interest the grantor had in the undivided one-half of Lot 4. The objections to the introduction of this evidence, as stated in the assignment and on Rec., p. 20, we think to be well taken. We submit that Hunt's location did not give him any right or interest in the property; that the deed of Cooper to Twan did not convey to the latter any right or interest therein; and that, therefore, Twan had nothing that he could convey to VanGasken. Men cannot acquire rights to property by exchanging deeds, for deeds are only operative when there is some right, title, or interest which they can convey.

Sixth.

In this assignment, Rec., p. 13, it is charged that the court erred in admitting in evidence the record of a purported deed from William Van Gasken to the Alaska Mercantile and Packing Company of an undivided one-half interest in Lot 4, and it is insisted that it was immaterial, irrelevant, no proper foundation had been laid for its introduction, and that it did not appear that Van Gasken had any

title or interest in the lot which he could convey.

For objections, see Rec., pp. 20, 30.

The deed thus spoken of is to be found on Rec., p. 23, and all that we said in support of the fifth assignment applies here.

If Van Gasken got no title by the deed executed to him, it is clear that he had none which he could convey to the grantee named in this deed. Moreover, the alleged incorporation of the company named as grantee in this deed had not been proven or established.

Seventh.

In this assignment, Rec., p. 13, it is averred that the court erred in admitting in evidence an exhibit purporting to be the certified copy of Articles of Incorporation of the Alaska Mercantile and Packing Company, certified to by the secretary of state of the State of Washington. The objections to this document were that it was incompetent, proper foundation for its admission had not been laid; that it did not appear that the purported articles were in accordance with the laws of the State of Washington or the late Territory of Washington, or that the corporation had complied with the laws of Washington in any relation to corporations, or that the purported corporation had any existence as a corporation in the State or Territory of Washington; and that it did not appear by any evidence that the company had complied with the laws, if any, of Washington relating to the filing and recording of articles of incorporation, so as to make a certified copy evidence in the courts of the District of Alaska.

For objections, see Rec., pp. 20, 30.

These alleged Articles of Incorporation are to be found on pages 26, 27, 28 of the Record. The Articles are preceded by the certificate of the Secretary of State, in which he says that he has compared the copy with the original Articles now of record in his office, and finds the same to be a true and perfect copy. The Articles purport to have been executed March 12, 1888, before a notary public in Pierce county, Territory of Washington, Rec., p. 28. They were filed in the office of the secretary of Washington Territory, March 15, 1888, and recorded March 30, 1888, Rec., p. 28. The instrument was recorded July 21, 1891, in the Juneau Recording District, Rec., p. 28.

But a power of attorney should have been filed also.

Sec. 3276, Hill's Oregon Code, is as follows:

> "A foreign corporation, before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent, which power of attorney, so long as such company shall have place of business in the state, shall be irrevocable except by the substitution of another qualified person for the one mentioned therein as attorney for such company."

Sec. 3277 enacts that such attorney shall be a citizen of the United States and of the State of Oregon, and the power shall authorize and empower him to accept service of all writs and processes, and shall constitute him the attorney and agent of the cor-

poration upon whom lawful and valid service may be made of all writs and processes in any action, suit or proceeding by or against the corporation.

Eighth.

In this assignment, Record, p. 13, it is averred that the court erred in admitting in evidence what purported to be a record of conveyance from the Alaska Mercantile & Packing Company to W. J. Thompson, purporting to convey to him an undivided one-half interest in Lot 4, over the following objections: That it was incompetent, immaterial and irrelevant, it not appearing that the company was authorized to own or convey real estate or had any interest in or title to the lot; that it did not appear by any evidence that the purported conveyance was executed by the corporation or authorized by it to be executed, and it appeared affirmatively that it was not executed under its corporate seal. It was also objected that the purported record is not a record, and is wholly incompetent as evidence, because it purports to have been executed in the State of Washington, and acknowledged before a notary public, but was unaccompanied by a certificate attached thereto of the clerk, or other proper certifying officer, of a court of record, under the seal of his office; that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such persons subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of that State. It not appearing from the Record that the deed had such certificate

attached, it was not, under the laws then in force in the district of Alaska, proper to be recorded, and it was wholly incompetent as evidence for any purpose.

For objections, see Rec., pp. 20, 30.

By referring to the alleged Articles of Incorporation, Article II, Record p. 27, it will be seen that the corporation had the power to carry on a general mercantile business in Washington and Alaska under the laws therein cited, and to engage in the business of packing and preserving fish in Washington and Alaska, and to do and perform any act or acts, and to construct and maintain any building or buildings, and to do and perform all other acts necessary in carrying out, or cognate to, the objects of the company.

The alleged deed from this corporation to William J. Thompson is on pages 24 and 25 of the Record. The deed does not bear the corporate seal, although it is well settled that a corporation cannot execute a deed except under its coroprate seal.

In re St. Helen Mill Company, 3 Saw. 88;
Eagle Woolen Mills vs. Montieth, 2 Or. 277;
Richardson vs. Scott R. W. & M. Co. 22 Cal., 156;
Angell & Ames on Corporation, Sec. 295.

This deed was acknowledged by the officers of the company in Pierce County, State of Washington, October 21, 1891, before a notary public, who attached his seal to the certificate, but there is no certificate attached from the clerk, or other proper certifying officer, that the person whose name is subscribed to the certificate of acknowledgment

was, at the date thereof, such officer as he is therein represented to be, etc. In the absence of such a certificate as that, the instrument was not admissible to record in Alaska, nor was the record admissible in evidence in its courts.

Ninth.

In this assignment, Rec., p. 14, it is stated that the court erred in admitting in evidence an exhibit purporting to be a deed of the property in dispute from W. J. Thompson and wife to O. H. Adsit, and purporting to be recorded in Book 10 of the deeds of the Juneau Recording District. This was admitted in evidence over the following objections: that it did not appear by any evidence that Thompson and wife were inhabitants of the town of Juneau, or ever were inhabitants thereof, or that they ever occupied or had been in possession of said premises, or that they had any title or interest in the premises which they could convey; that the deed was wholly incompetent as evidence for any purpose, and was not entitled to be recorded, because the deed purports to have been acknowledged in the District of Alaska before the county clerk of the district, and is signed by the county clerk under the seal of the Superior Court. The trial court was bound to take judicial notice of the fact that there is no such officer as a county clerk in Alaska, there being no such subdivisions in the territory as counties, and that there is no such court as a Superior Court.

For objections, see Rec., pp. 20, 30.

This alleged deed from Thompson to Adsit is to be found on pages 25 and 26 of the Record. This

instrument purports to have been executed before "J. M. Brown, county clerk and clerk of the Superior Court," in Pierce County, State of Washington. Later on in the trial the plaintiff offered in evidence what he claimed was the original deed from Thompson to Adsit, Rec., p. 31.

Counsel for defendant interposed the same objection as was made to the introduction of the record of the deed which appears on pages 25 and 26 of the printed record. This objection was overruled and exception was duly taken. This instrument bears date of March 24, 1894, and was acknowedged in the District of Alaska on that day before "J. M. Brown, county clerk and clerk of the Superior Court."

In this connection it is interesting to note the fact, as shown by page 48 of the Record, being page 90 of the Transcript, that near the end of the trial the following admission was made:

> "It is here admitted by the plaintiff that the Thompson named as the grantor in the deed from W. J. Thompson and wife to plaintiff never lived in the District of Alaska."

Turning to the copy of the alleged deed, found on pages 25 and 26, we will observe that it does not contain the usual and necessary certificate from a superior officer that J. M. Brown was the clerk of the court, etc. Without such certificate the deed could not be admitted of record, and the record thereof was not admissible in evidence.

Tenth.

It is next assigned as error, Rec., p. 15, that the court erred in denying the motion for judgment of non-suit made at the close of the plaintiff's case,

upon the theory of an entire failure of proof, and for these reasons: The evidence failed to show that the plaintiff was the owner, either by himself or grantors, either by the right of occupancy and possession of, or of any other right in, the premises in dispute, and that there was no evidence of the ouster of the plaintiff by the defendant.

For objections, see Rec., pp. 20, 30.

The record evidence, which has been considered under the previous assignments in error, fails to show that any of the grantors possessed a grantable right, title, or interest in and to the property in question, and it follows, therefore, that the plaintiff had no right, title, or interest which he could litigate with the defendant, or which would be taken cognizance of by the law.

After the introduction of the alleged record evidence, the plaintiff put upon the witness stand John Olds, who testified (p. 32 to 33) that Joe Twan built a house on Lot 4, in 1882, and occupied it for a dance house. After that it was occupied as the Palace Theater, by Hart and Moore, in 1885 and 1886. On cross-examination he said that later on it was occupied as a store by Kaufman Brothers, as the tenants of Mr. Malony.

Edward James testified (Rec., pp. 34, 35, and 36) that Joseph Twan built a house on the lot in the spring of 1882, and ran it as a dance house for three or four years. Then it was occupied by Hart and Moore for a theater on a lease from Twan, who kept possession of the premises until the alleged sale to the Alaska Mercantile and Packing Company. That company occupied the house for mercantile purposes

in 1888 or 1889, when it was rented to a man by the name of Howard, who ran a store there. On cross-examination he said that the Alaska Mercantile and Packing Company had not done any business in Juneau since 1888 or 1889, and none in the Territory of Alaska, unless it was fishing at Idaho Inlet.

John G. Heid testified (Rec., p. 37) that he had lived in Juneau since 1885, and was acquainted with the premises in dispute. He says that when he first came to Juneau, Joseph Twan was in possession and ran a dance house. Subsequently, he made a lease to Hart and Moore, who ran a theater. Subsequently, Slim Jim and William McFee bought into it, and that fall he sold out to the Alaska Mercantile and Packing Company, which continued business there until the fall of 1889 or 1890, when it closed out. Mr. Heid says that subsequently he acted as the agent for the Alaska Mercantile and Packing Company. It seems that a man by the name of Howard was in possession a part of the time under the Packing Company. After Howard moved out of the premises, the building was vacant for quite a while. Mr. Heid endeavored to rent it and tried to sell it for the Alaska Mercantile and Packing Company but did not succeed in getting any tenant after Howard left it. He had no recollection of anybody being in it after that time until suit was commenced by Mr. Shellhouse, and after Mr. Gamel bought it in under that suit.

This evidence, both oral and in writing, fails to show that the plaintiff was entitled to the relief which he asked for in the complaint. It is an elementary rule that a plaintiff in ejectment must re-

cover on the strength of his own title, and can take nothing by reason of defects in the title of the defendant. *Watts vs Lindsay*, 7 Wheat., 158.

Actual possession, not the constructive possession, must be averred and proved to support the action.

> *Russell vs. Desplons*, 29 Ala., 308;
> *Singleton vs. Findley*, 1 Port. (Ala.), 144; 3 Wait Act. & Def. 396;
> *Stringfellow vs. Cain*, 99 U. S., 616, 617.

The plaintiff in ejectment who rests his claim upon prior possession must allege and prove that he had such possession within the time fixed by the statute of limitations. *Young vs. Irwin*, 2 Hayward, 9; 3 Wait Act. & Def., 22.

The plaintiff wholly failed to make such proof. Indeed it would not have been legally possible for him to make that proof in view of the fact that his verified complaint charged that the defendant and his grantors, since April 29, 1891, had retained possession of the property. Rec., pp. 1 and2.

Elsewhere in this brief, we have quoted Sec. 3524, Hill's Oregon Code, in which it is provided that three years' quiet possession of the premises, immediately preceding the commencement of the action, may be pleaded in bar thereof, and we have asked the attention of the court to the fact that the defendant did plead that three years' bar in the fourth paragraph of his second answer. See Record top of page 5.

For these reasons, and the others hereinafter set forth, we submit that the court erred in denying

the defendant's motion for a non-suit. For this motion, see Record, p. 38, Transcript 71. The court overruled the motion and the defendant excepted.

Eleventh.

The next assignment, Rec., p. 15, is that the court erred in denying the motion for a new trial, for the reasons that the evidence is insufficient to justify the decision of the court in this: That there was no evidence showing or tending to show the plaintiff to be the owner of the premises or entitled to the possession thereof, or that he had any legal estate therein, or that the defendant ousted or ejected the plaintiff or his grantors from the premises, or that he wrongfully withheld the possession of the property from the plaintiff; also, on account of errors of laws occurring at the trial and excepted to by the defendant, which are more particularly set forth in the preceding assignments of error.

For objections, see Rec., pp. 20, 29, 30

The defendant introduced the following evidence:

1. A deed from Orville T. Porter, United States marshal for the District of Alaska, to Alfred H. Gamel, dated November 24, 1891, and duly acknowledged. Rec., pp. 38. 39, and 40.

This deed recites the rendition of a judgment in the United States District Court for the District of Alaska, July 25, 1891, in favor of Aaron Shellhouse against William VanGasken and —— Birmingham, partners under the firm name of the Alaska Mercantile and Packing Company, and the issuance of an execution thereon, July 27, 1891, which was delivered to the marshal, who levied the execution upon

the undivided one-half interest in and to Lot 4, together with an undivided one-half interest in and to all buildings and improvements thereon situated. All this property he advertised for sale and sold August 31, 1891, to Alfred H. Gamel, his heirs and assigns, conveying thereby all the right, title, and interest which the said Van Gasken and Birmingham, as the Alaska Mercantile and Packing Company, had, on the 27th day of April, 1891, or at any time afterwards.

2. A deed of the property in controversy from Gamel and wife to Emery Valentine, dated January 20, 1894. Rec., pp. 40, 41.

3. A deed from Emery Valentine to J. F. Malony, dated Jaunary 20, 1894. Rec. p. 42.

4. A power of attorney from Gamel and wife to John F. Malony, dated April 2. 1892.

The foregoing instruments were all duly recorded.

John F. Malony testified, Rec., p. 44, that he had lived in Juneau since 1885, and had been in possession of an interest in the property since August 31, 1891, at which time he got a certificate of the sale from the marshal, *and since that date he had been in the continuous possession of the property, either by himself or by his tenants. He also stated that during that time his possession had not been disputed by anyone; that he had made improvements on the premises, building a new addition on one side, and when the building burned down practically it was rebuilt by him.* He testified, as the other witnesses did, that the Alaska Mercantile and Packing Company abandoned Alaska as a field for the doing of business in 1887 or in 1888, and since

that time it had not had an agent in the territory to his knowledge. He said that no one by the name of Thompson had lived on the property since 1885. On cross-examination he said that Mr. Heid had made some threats against his title to the property, and that the witness had indemnified his tenants on that account.

O. H. Adsit, grantee in the deed from W. J. Thompson and wife, testified that the purchase was made through Mr. Hale, of Tacoma, Washington, where Thompson lived at that time.

John Olds was called and testified that he did not know of a man by the name of W. J. Thompson, living in Juneau. Then it was admitted by the plaintiff that the Thompson named as the grantor in the deed spoken of never lived in the District of Alaska.

The defendant then introduced in evidence the complaint, judgment, execution, notices, writ of execution and advertisement, in the case of Shellhouse, plaintiff, vs. Van Gasken and Birmingham, partners under the firm name of the Alaska Mercantile and Packing Company. Rec., pp. 49 to 55.

We submit that the evidence shows that the defendant was entitled to judgment. If anyone owned any right, title, or interest in and to the premises in controversy at the time the execution was levied upon the property, it was the Alaska Mercantile and Packing Company. It is shown by the evidence that the company had the property in its possession as late as 1888 or 1889, and that subsequently it was looked after by their agent there, and was occupied a portion of the time by Howard.

The marshal's sale vested in the purchaser every right, title, and interest that belonged to the Alaska Mercantile and Packing Company, whether it was a partnership or a corporation. The judgment of the court adjudged it to be a partnership. Rec., p. 56.

Malony shows that he, by himself and tenants, had been in the continuous and undisturbed possession of the property since August 31, 1891, when he got from the marshal a certificate of the sale of the land. In this he is corroborated by the averment in the complaint that he and his grantors had been in possession of the property since April 29, 1891.

It is also admitted by the plaintiff, Rec., p. 48, that Thompson and wife had never lived in Alaska, and therefore it is perfectly apparent that they never entered into possession under the deed which was made to them March 24, 1894. It is also practically admitted by the plaintiff's witnessess that the property had been in the adverse possession of Malony and his tenants for several years prior to the trial. Heid, pp. 33, 34; Olds, pp. 35, 36.

Therefore, it is not only admitted by the plaintiff in his complaint, but it is also established by his own evidence, that he and his grantors have not been in possesion of the property since April 29, 1891, and that, during the interval, Malony and his grantors and tenants were in possession thereof. Malony shows that his possession was quiet and continuous after August 31, 1891. He has therefore shown more than three years' quiet possession, which, under Section 3524 of the Oregon Code, and the averments of his answer, is a bar to the action.

Twelfth.

The last assignment, Record p. 15, is that the court erred in rendering judgement for plaintiff and against the defendant. If the court should take the view that this was simply a controversy about the *possession* of the undivided half of lot 4 and the buildings thereon situate, we will ask special attention to the testimony upon the subject of possession of which the following is an abstract:

Plaintiff's Testimony.

JOHN OLDS: Thinks Joe Twan built the house in spring of 1882. Thinks he ran it as a dance house until 1883 or 4. Don't know when he got out of it; but thinks he occupied it until he sold it to "that mercantile and packing company". After Twan quit, the place was occupied by Jack Moore and Hart. They had what was known as the Palace Theatre there—in 1885-6. So far as he knew Twan was in possession until he sold to Alaska Mercantile and Packing Company.

CROSS-EX: Guesses different parties have been in possession for 4 or 5 years. Kaufman Brothers were in possession and had a store there for a time. Understands they were there as tenants. Don't know of his own knowledge. Thinks he introduced Kaufman to Malony with a view to renting the house (for Kaufman).

RE-DIRECT: This was about 1892 or 1893.

EDWARD JONES: Joe Twan built the house in spring of 1882. Ran a show and dance house there 3 or 4 years. Thinks Hart and Moore opened the place up as a theatre about 1885. Pretty sure Twan

was in possession up to the time he leased the place to the Palace Theatre.

JOHN OLDS: recalled. Always understood Twan was in possession up to the time he leased to the Palace Theatre people. Never heard anything to the contrary. Packing Company ran a general store in the building—could not say how long they continued business there—not very long—a year or two—thinks about 1888 or 1889. Old man Howard and another man then ran a store there. After he moved out, guesses Kaufman rented it. Don't recollect of any other person occupying it from Joe Twan down to the Palace Theatre and the Alaska Mercantile and Packing Company.

CROSS-EX: VanGasken represented the Packing Company. Don't know of anybody else who was interested in Company. Thinks they closed business about 1888 or 1889.

EDWARD JONES: Howard kept a store there.

Q. There was a continuous possession all the way down through these parties?

A. Yes; he had a store there.

JOHN G. HEID: Has lived in Juneau since April, 1885. Has known the lot since that time. Joe Twan was then in possession of the lot. The following year Twan made lease to Hart and Moore. Thinks Slim Jim bought into it and Wm. McFee, and that Fall he sold out to A. M. & P. Co., which continued business to Fall of 1889 or 1890, when they closed out. He went East in 1888 and came back in the spring and they were not doing business then. Afterward old man Howard paid rent. Gamel first represented the Company, and after-

wards he, witness, had charge. The Company occupied it nearly two years. Don't remember how long Howard was in there. After Howard moved out the premises were vacant quite a while. Did not succeed in getting tenant after Howard. No recollection of anybody occupying it until after Gamel bought it under Shellhouse suit.

Defendant's Testimony.

JOHN F. MALONY: Has been in continuous undisputed possession since August 31, 1891, when he got a certificate of the Marshal's sale; sixty days before making deed. Has put an addition on one side, and rebuilt the place after its practical destruction by fire. The A. M. & P Co. was represented in Juneau by Wm. VanGasken. Company was in business there a little over one year. Went away latter part of 1887 or along towards 1888. Has since done no business in Juneau. Does not know W. J. Thompson. Does not live in Juneau to his knowledge. Thompson never lived in that property since 1885, at least.

CROSS-EX: At sale of property, Mr. Heid gave notice to the effect that Birmingham and VanGasken did not own property. Has held possession by tenants. When Kaufman occupied it, he gave him an indemnifying bond. Kaufman did not dispute his title, but Heid made some threat against him. Did not indemnify any other tenants. Claim title by the execution sale and more than 5 years' undisputed possession, prior to suit. None of the improvements except the last repairs when the building burned down were made after suit. These

repairs cost $250 or $260. Other repairs cost $500 or $600, or more—would hardly exceed $700. At present has one room rented for $10, one for $15, main hall did rent for $50, but did not get much rent out of it. Has not received enough rent to pay for the improvements. It was vacant a considerable time until Kaufman went in there—they occupied it 1½ years at $30 per month. Millinery store has been there 6 or 8 months; $10 per month.

O. H. ADSIT: Never saw Thompson. He lives in Gilman near Seattle. Don't know that he ever lived in Alaska.

CROSS-EX: Hale, of Tacoma Grocery Company procured deed from Thompson to him.

Admitted by plaintiff that Thompson never lived in Alaska.

1. This testimony, as we think, clearly shows that the Alaska Mercantile and Packing Company had abandoned possession of the property a long time prior to the sale thereof made by the marshal. If so, anyone had the right to take possession and occupy the property to the exclusion of the Alaska Mercantile and Packing Company, and thus acquire rights which he could defend successfully as against that company or any of its grantees. It must not be forgotten that there was then no way in which that company could obtain title to real estate in Alaska, and that the only right which could be obtained by it was a possessory right, which right could be lost by abandonment or non-user. There can be no constructive possession of public lands. When one in possession of such property as this abandons it, he loses every shadow of claim thereto.

His right was a mere possessory right without other title. He had no rights which he could reserve. *Missionary Society vs. Dalles*, 107, U. S., 336. On page 344, the court said :

> "All persons, therefore, who settled upon the public lands acquired no rights thereby as against the Government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession. In short, the settler had no right as against the Government, and no rights under the laws of the United States as against anyone else to the possession of the land in his actual occupancy, except and only so long as such occupancy continued."

To the same effect are—

Stringfellow vs. Cain, 99 U. S., 610 ;
Hussey vs. Smith, 99 U. S. 20 ;
Lownsdale vs. Parish, 21 How., 290 ;
Stark vs. Starns, 6 Wall,, 402 ;
Sabariego vs. Maverick, 124 U. S., 261.

It is true that after Malony had taken possession of this property, the Alaska Mercantile and Packing Company executed a pretended deed to William J. Thompson, bearing date of October 21, 1891. Be-

fore the execution of this deed the marshal had sold the property to Malony's grantor, and he had taken possession thereof, a possession which, since that time, has been continuous in the marshal's grantee and those claiming under him. But, supposing that the Alaska Mercantile and Packing Company had the right of possession, it is perfectly clear that it had no claim or color of title to the property, for the title belonged to the United States, as is held in the cases above cited, and in *Kinkead vs. United States*, 150 U. S., 483. Therefore, it follows that the company did not have a right of possession which could be transferred by deed or otherwise, unless the purchaser in possession should see fit to yield up or abandon the possession, and permit the grantee of the company to possess the property. *Daubinbiss vs. White*, 31 Pac. Rep., 360. Of course this is a familiar rule, and its application is plain.

Moreover, the evidence shows that the grantee of the company, W. J. Thompson, never had possession of the lot and was never in Alaska. March 24, 1894, Thompson executed a pretended deed to Adsit, but, at that time, Malony was in possession, he having obtained a deed therefor January 20, 1894, from Valentine, who was in possession and had obtained title from Gamel, the purchaser at the marshal's sale.

Thus it appears that the Alaska Mercantile and Packing Company and W. J. Thompson were not in possession of this property when they pretended to convey it, and that Adsit, who took a pretended deed from Thompson, has never been in possession

of it. The Alaska Mercantile and Packing Company is not covered by the rule in *Hussey vs. Smith*, 99 U. S., 20, because there is neither allegation nor proof that the Juneau townsite had been entered, nor does it appear either by allegation or proof that the company came under the terms of Sec. 12 of the act of March 3, 1891, 26 Stats., 1100.

There is not one word of proof or allegation bringing this company under the provisions of that act or of any of the rules and regulations made by the Secretary of the Interior.

Section 2327 R. S. did not operate in Alaska until March 3, 1891, and there is no pretense that either before or after that time the Alaska Mercantile and Packing Company, or its grantors, or grantees had acquired any right or title in any of the methods known to the laws of the United States. Adsit has never had possession of the property. His grantor, Thompson, never had possession of it. Adsit only had such rights as Thompson had. It is admitted, and also clearly established by the evidence, that Thompson never had possession of the property. This possession was abandoned by the Alaska Mercantile and Packing Company in 1888 or 1889, certainly prior to 1891. Gamel, the Marshal's grantee, took possession of it, and he and his grantees have held possession until the present time.

We submit that the doctrine laid down in *Missionary Society vs. Dalles*, 107 U.S., 336, establishes the right of Malony to this property. The Alaska Mercantile and Packing Company abandoned the property in 1888 or 1889, as the evidence shows, we

think, but, at any rate, it is absolutely clear that it abandoned the property when it executed the pretended deed to Thompson, October 21, 1891.

Newman vs. Franklin, 28 N. W. Rep., 579;
Trevaskis vs. Peard, 44 Pac. Rep., 246.

2. For the purposes of this case, it does not matter whether the Alaska Mercantile and Packing Company was, in fact and in law, a corporation or a partnership. When Shellhouse brought suit, he charged that Van Gasken and Birmingham were partners under the firm name of the Alaska Mercantile and Packing Company, and his complaint was verified, Rec., p. 49. The judgment shows that the defendants were regularly served with process, and it adjudges them partners, "formerly partners as the Alaska Mercantile and Packing Company," Rec., p. 50. The previous entry, Rec., p. 50, shows that the defendants had been regularly served with process by publication, and they were then defaulted July 13, 1891. The judgment was rendered July 25, 1891. This publication was evidently under Sec. 56, Hill's Oregon Code.

Adsit introduced in evidence the complaint, default, judgment, execution, etc., presumably upon the theory that he could thereby, and in this sort of an action, attack the validity of the marshal's sale, although the judgment on which the sale was based recites the partnership of Van Gasken and Birmingham in the name of the Alaska Mercantile and Packing Company.

Upon collateral attack, recitals in the judgment are conclusive upon parties thereto and upon those

claiming under them. *McCauley vs. Fulton*, 44 Or., 359. So it would seem to be established conclusively that this Alaska Mercantile and Packing Company is a partnership and not a corporation.

There is nothing in the Record to show that the company of the same name, which it is alleged was organized under the laws of Washington, was the Alaska Mercantile and Packing Company, which at one time had possession of this property. A corporation in Washington and a partnership in Alaska may well have the same name. The presumptions are all against the foreign corporation theory and in favor of the partnership idea.

We respectfully submit that the defendant, Malony, should have had judgment, and that the judgment of the court below should in all things be reversed.

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